

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-070683
		TRIAL NO. B-0703872
Plaintiff-Appellee,	:	
		<i>JUDGMENT ENTRY.</i>
vs.	:	
ANTHONY SPRINGER,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Anthony Springer sold cocaine to an undercover officer on April 19, May 2, and May 7, 2007. Springer was arrested after the May 7 sale. He admitted to all three sales. Police drove Springer to his home where he lived with his mother and brother. Springer and his mother consented to a search of the home. Springer occupied the entire second floor of the home, which consisted of one large room. His mother lived on the first floor and his brother lived in the basement. Only Springer's second-floor room was searched. Police found cocaine, marijuana, and \$500. Two operable firearms were found in a dresser drawer.

Springer was charged with three counts of trafficking in cocaine, one count of trafficking in cocaine with a firearm specification, and one count of possessing cocaine with a firearm specification. Counts one, two, and three corresponded to the three sales

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

to the undercover officer. Counts four and five were based on the cocaine and handguns found in Springer's room.

Springer waived a jury and was tried to the court. Springer and his brother testified that, on the morning of Springer's arrest, a fight had ensued when someone had attempted to rob his brother. They testified that Springer had broken up the fight and had taken the firearms from his brother and the robber and put them in his drawer.

Springer made a Crim.R. 29 motion for acquittal on the firearm specifications. The trial court overruled the motion and found Springer guilty of all charges. The court merged the gun specifications and imposed a one-year mandatory sentence. Springer was sentenced to six months' concurrent incarceration on each count, for an aggregate sentence of 18 months.

Springer's three assignments of error allege that the trial court erred in overruling his Crim.R. 29 motion for acquittal on the firearms specifications, and that his convictions for the firearm specifications were based upon insufficient evidence and were against the manifest weight of the evidence.

Springer first argues that the evidence was insufficient to prove that the firearms were operable, but Officer Bode testified that the guns had been test-fired the day after Springer's arrest and were found to be operable.

Springer next argues that the trial court erred in convicting him of the firearm specifications because there was no evidence that he had carried the guns while committing any offenses. Springer argues that because he was not in his residence when police found the cocaine and guns in his room, there was insufficient evidence that he had a firearm on or about his person or under his control when he committed the trafficking and possession offenses involving the drugs found there. Springer

argues that evidence of constructive possession is not sufficient to establish a firearm specification.

The fact that an offender's gun is found in proximity to drugs "lends itself to an argument of constructive possession of the firearm while committing the drug possession offense."² Firearm specifications attached to drug offenses have been upheld under similar circumstances in the following cases: *State v. Conway*³ (gun and drugs found in a drawer in the defendant's bedroom while he was being held downstairs by police); *State v. Seljan*⁴ (operable rifle hanging on the defendant's bedroom wall and cocaine as well as drug paraphernalia found in the bedroom); *State v. Benton*⁵ (drugs and a gun were found in defendant's wife's car, and the defendant admitted that the items were his—defendant's admission was enough to show that he had had control of the gun at some point during the commission of the underlying drug offense); *State v. White*⁶ (gun found in bedroom of house where police had made undercover drug buys); *State v. Spurlock*⁷ (defendant and his partner arrested in bedroom where drugs were found under a mattress and a gun was found in a nightstand); and *State v. Brown*⁸ (drugs were found in a kitchen drawer and in a purse in the bedroom where a gun was found under the mattress, and the evidence showed that the defendant lived in the bedroom).

In this case, police found the cocaine and the guns in Springer's room. Under the totality of the circumstances, reasonable minds could have concluded that the guns belonged to Springer and that he had possessed them while possessing or trafficking in

² See *State v. Jackson*, 169 Ohio App.3d 440, 2006-Ohio-6059, 863 N.E.2d 223.

³ 8th Dist. No. 86140, 2005-Ohio-6634.

⁴ 8th Dist. No. 89845, 2008-Ohio-1707.

⁵ 8th Dist. No. 82810, 2004-Ohio-3116.

⁶ 8th Dist. No. 82495, 2004-Ohio-228.

⁷ 3rd Dist. No. 5-03-11, 2003-Ohio-6006.

⁸ (1995), 107 Ohio App.3d 194, 668 N.E.2d 514.

the cocaine found in his room. We hold that the evidence was such that reasonable minds could have reached different conclusions as to whether the firearm specifications had been proved beyond a reasonable doubt.⁹ Further, after viewing the evidence in the light most favorable to the prosecution, we hold that a rational trier of fact could have found that the firearm specifications had been proved beyond a reasonable doubt.¹⁰ We also determine that the trial court, in resolving conflicts in the evidence, did not clearly lose its way and create such a manifest miscarriage of justice that Springer's conviction must be reversed and a new trial ordered.¹¹ The assignments of error are overruled.

We note that Springer was convicted in count four of trafficking in the cocaine found in his room in violation of R.C. 2925.03(A)(2). He was convicted in count five of possessing the same cocaine in violation of R.C. 2925.11(A). In *State v. Cabrales*,¹² the Ohio Supreme Court stated, "Trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import under R.C. 2941.25(A), because commission of the first offense necessarily results in commission of the second." Therefore, the trial court should have imposed only one sentence for counts four and five.

The sentence imposed on count four for trafficking in cocaine and the sentence imposed on count five for possessing cocaine are vacated, and this case is remanded for resentencing so that only one sentence is imposed for counts four and five. The judgment of the trial court is affirmed in all other respects.

⁹ See *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

¹⁰ See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; *State v. Roberts*, 1st Dist. No. C-040547, 2005-Ohio-6391.

¹¹ See *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541; *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

¹² 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph two of the syllabus.

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Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., CUNNINGHAM and WINKLER, JJ.

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on June 25, 2008

per order of the Court _____.
Presiding Judge